STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 4, 2013
v	No. 307449 Wayne Circuit Court
DEMARCUS LEVON THOMPSON, Defendant-Appellant.	LC No. 11-004732-FC

Before: STEPHENS, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of carjacking, MCL 750.529a, attempting to disarm a peace officer, MCL 750.530, two counts of assaulting, resisting, obstructing a police officer, MCL 750.81d(2), unlawfully driving away an automobile (UDAA), MCL 750.413, and second-degree retail fraud, MCL 750.356d. Defendant was sentenced to 15 to 30 years for carjacking, three to five years for attempting to disarm a peace officer, 171 days for each count of assaulting, resisting, obstructing a police officer, 171 days for UDAA, and 171 days for second-degree retail fraud. We affirm.

Defendant raises three issues on appeal. First, defendant contends that his convictions for both carjacking and UDAA violate the Double Jeopardy Clause of the United States Constitution. We disagree. Because defendant did not raise this issue at trial, this Court reviews "an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that . . . affected the outcome of the lower court proceedings." *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008).

The convictions at issue in defendant's double jeopardy claim are carjacking and UDAA, and this same question was recently answered by this Court in *People v Cain*, 299 Mich App 27; ___ NW2d ___ (2012). This analysis will follow this Court's recent decision in *Cain*.

The carjacking statute, MCL 750.529a, provides:

> (1) A person who is in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence . . . is guilty of carjacking . . .

> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes acts that occur *in an attempt to commit the larceny* or during commission of the larceny . . . . [Emphasis added.]

The UDAA statute, MCL 750.413, provides:

> Any person *who shall*, willfully and without authority, take possession of and drive or take away . . . any motor vehicle, belonging to another, shall be guilty of a felony . . . . [Emphasis added.]

Analyzing these two statutes under the same-elements test, this Court stated:

> It is clear that a carjacking conviction requires proof of the use of force or violence, or the threat of force or violence, while a UDAA conviction does not. The issue is whether UDAA contains an element that carjacking does not. [*Cain*, 299 Mich App at 42.]

This Court proceeded in its analysis: "UDAA contains an element that carjacking does not—the completed larceny of a motor vehicle—and the double jeopardy same-elements test is not violated." *Id.* at 44. Ultimately, this Court held that convictions for both carjacking and UDAA do not violate the Double Jeopardy Clause. *Id.* Similarly, we conclude that defendant's convictions do not violate the Double Jeopardy Clause of the United States Constitution.

Second, defendant contends that the prosecution presented insufficient evidence on the element of larceny of a vehicle in order to prove, beyond a reasonable doubt, that defendant was guilty of carjacking. We disagree.

When reviewing a claim of sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005), overruled on other grounds *People v Nyx*, 479 Mich 112 (2007). This Court "must determine whether any rational trier of fact could have found that the essential elements of the crime were proven as required." *Id.* Additionally, "[t]he evidence is sufficient to convict a defendant when a rational factfinder [sic] could determine that the prosecutor proved every element of the crimes charged beyond a reasonable doubt." *People v Cain*, 238 Mich App 95, 117; 605 NW2d 28 (1999).

The prosecution presented sufficient evidence on the element of larceny of a vehicle in order to prove, beyond a reasonable doubt, that defendant was guilty of carjacking. In 2004,

> [l]ike the armed robbery statute, the Legislature amended the carjacking statute to describe the offense as one that occurs *during the course of committing a larceny*, with that phrase defined as acts that occur in an attempt to commit the larceny. In *People v Williams*, 288 Mich App 67, 79-80; 792 NW2d 384 (2010), which was affirmed by *Williams*, 491 Mich at 184, this Court emphasized the almost identical language of the robbery and carjacking statutes. This Court observed that the revised statute was intended to include attempts to commit the designated crime. As the Courts ruled in the *Williams* opinions, we also hold that, as

> amended, a carjacking conviction does not require a completed larceny. [*Cain*, 299 Mich App at 44 (emphasis added) (internal quotations and citations omitted).]

Since the amendment, though, this Court has continually cited case law decided prior to the amendment to establish the elements of carjacking. In particular, this Court has relied on the recitation of the elements enunciated in *People v Davenport*, 230 Mich App 577; 583 NW2d 919 (1998):

> [I]n order to sustain a carjacking conviction, the prosecution must prove (1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting the other person in fear. [*Id.* at 579.]

Additionally, the pre-amendment carjacking statute, which required proof that someone "robs, steals, or takes a motor vehicle," 1994 PA 191, has since been amended to require proof that a person engaged in the "commission of a larceny." 2004 PA 128. Thus, this Court's pre-amendment holding that carjacking is not a specific intent crime, *Davenport*, 230 Mich App at 578, is no longer accurate. Conversely, larceny "is a specific intent crime for which the prosecution must establish that the defendant intended to permanently deprive the owner of property." *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010).[1] The intent to permanently deprive a person of his property is a critical element of larceny. *Cain*, 238 Mich App at 123-124. In *Harverson*, this Court examined the unarmed robbery statute, which, like carjacking, requires proof of the commission of a larceny. *Harverson*, 291 Mich App at 177-178. The "intent to permanently deprive" is not "literal." *Id.* at 178. "Rather, the intent to permanently deprive includes the retention of property without the purpose to return it within a reasonable time . . . ." *Id.*

Since the amendment of the carjacking statute, this Court has not published a decision which articulates the elements of carjacking. Instead, the published decisions merely quote the statute without breaking the statute down into elements. See *Cain*, 299 Mich App at 42. In *Williams*, 288 Mich App at 85, this Court provided that "[c]ourts must proceed with greater caution in their use and reliance on prior published opinions delineating the elements of armed robbery, which preceded the revision of MCL 750.529." *Id.* at 85. "Clearly, the Legislature has enacted changes affecting the elements comprising this offense [robbery] and it is our responsibility to correctly apply the revised language of MCL 750.529 to the particular evidence and facts of each individual case." *Id.*

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[1] Although *Harverson* does not interpret the carjacking statute, the Court in *Harverson* did interpret the unarmed robbery statute, which also requires proof that a defendant was in the course of committing a larceny. *Id.* at 177; see also MCL 750.530. In *Cain*, this Court applied the Supreme Court's interpretation of the robbery statute in *Williams* to the carjacking statute. *Cain*, 299 Mich App at 44.

Applying this Court's holding of *Williams* to this case, we conclude that *Davenport*'s articulation of the elements is still relevant and instructive. However, the first element of a carjacking must require exactly what the amended carjacking statute requires: proof that defendant was "in the course of committing a larceny of a motor vehicle." MCL 750.529a. Specifically, the statute defines "in the course of committing a larceny" to include:

> acts that occur in an attempt to commit a larceny, or during the commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle. [MCL 750.529a(2).]

Additionally, the remaining elements from *Davenport* are still applicable:

> (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting the other person in fear. [*Davenport*, 230 Mich App at 579.]

Sufficient evidence was presented on all three elements of carjacking, and the prosecution showed sufficient evidence that defendant had the intent to deprive Dearborn Police Sergeant Stephen White of the cruiser. First, sufficient evidence was proffered that defendant took the police cruiser. Defendant entered the cruiser, put the cruiser into drive, and touched the gas pedal with his foot. Thus, evidence was presented that defendant was in the process of committing a larceny. Additionally, the facts that defendant knew the cruiser was empty and entered it, and fought White while he attempted to drive the cruiser away, showed that he had the intent to deprive White of the cruiser. Second, the police cruiser was being driven by White, who as a Dearborn Police Sergeant, had the legal authority to possess the vehicle. Defendant took the car while White was hanging out of the passenger side window of the vehicle. Thus, the vehicle was taken in the presence of the person who had lawful possession of the vehicle. Third, defendant hit White's face during his taking of the vehicle and attempted to obtain possession of White's gun. Thus, defendant took the cruiser from White while using force. Therefore, the prosecution presented sufficient evidence to find defendant guilty of carjacking.

Third, defendant contends that his 15- to 30-year sentence for his carjacking conviction is cruel or unusual punishment. We disagree.

Because defendant never raised this issue at sentencing, this issue is unpreserved. Unpreserved claims are reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). A plain error is one that is "clear or obvious," and the error must affect the defendant's "substantial rights." *Id.* at 763. Lastly, defendant must have been prejudiced by the plain error. *Id.* "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence." *Id.* at 763-764 (internal quotations and alterations omitted).

Defendant's 15- to 30-year sentence for his carjacking conviction is not cruel or unusual punishment. Sentences that are proportionate to the seriousness of the offense and the offender are not cruel and unusual punishment. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790

(2002). A sentence within the guidelines range is presumed to be proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). "[T]o overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).

Under MCL 750.529a, carjacking is punishable "by imprisonment for life or for any term of years." Carjacking is a Class A crime against a person, and the statutory maximum sentence for carjacking is life in prison. MCL 777.16y. At sentencing, defendant was sentenced to 15 to 30 years in prison for carjacking. This sentence was based on the following scores: (1) Prior Record Variable (PRV) Score of 55 and (2) Offense Variable (OV) Score of 45. When these two scores are applied to the minimum sentence guidelines range grid at MCL 777.62, defendant's correct minimum sentencing guidelines range should have been 126 to 210 months in prison. However, on the sentencing information report, the trial court provided that the minimum range for defendant's sentence was 108 to 180 months. Ultimately, defendant was sentenced to a minimum term of 15 years (180 months).

The trial court's stated minimum sentence range was erroneous. However, the minimum sentence imposed by the trial court falls within the proper minimum sentence range. Because this sentence falls within the minimum sentence range of 126 to 210 months, defendant's sentence does not constitute cruel or unusual punishment.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Patrick M. Meter